UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

AMAZON.COM SERVICES LLC

Employer

and **Case 10-RC-269250**

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION

Petitioner

ORDER GRANTING EXTENSION OF TIME TO FILE ANSWERING BRIEF TO EXCEPTIONS

On August 2, 2021, the Hearing Officer's Report on Objections issued in this case. On August 16, 2021, the Employer filed exceptions to the Hearing Officer's Report with the Regional Director. On August 17, 2021, Counsel for the Petitioner made a request for an extension of time to file its answering brief to the Employer's exceptions to the Hearing Officer's report. The Employer does not oppose the request.

The request for an extension of time to file an answering brief is granted. The due date for the answering brief is extended 5 business days from the original due date of August 23, 2021 to August 30, 2021.

Dated: August 19, 2021

SCOTT C. THOMPSON
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 10

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PETITIONER's ANSWERING BRIEF IN OPPOSITION TO EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS

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I. INTRODUCTION

From the very beginning, the Employer has sought to dictate the terms under which an election should be conducted. Ignoring the ravaging effects the pandemic was having on its employees and the surrounding community, the Employer insisted that it could "arrange" for a safe manual election given its vast resources, resources that it offered to share with the Region. When the Region declined the Employer's offer to provide technical and material assistance for conducting a manual election and instead directed a mail ballot election, the Employer turned its attention to USPS, an agency over which it has considerable influence as a customer.

With the USPS coerced assistance, the Employer had (without prior authorization or supervision) a cluster box unit installed in the employee parking lot for the purpose of collecting mail ballots. Not only did the Employer have a CBU installed on its premises, it promoted the USPS' involvement to pressure employees into casting their ballot using the CBU. The Employer also erected a tent around the CBU and placed its central campaign slogan on the tent with the message that employees should mail their ballots here. The Employer established what amounted to a private polling place and, in so doing, sowed confusion and distrust over the integrity of the election process.

The Region must decisively and unequivocally reject the Employer's conduct. There should be no doubt that the D &DE did not authorize a collection box on the Employer's premises. The Hearing Officer correctly concluded that "by manufacturing a situation that created the impression that the Board had, either voluntarily or involuntarily, ceded its authority for collecting ballots and establishing procedures for conducting the election, the Employer interfered with the election proceedings."

In addition to its willful disregard for the Board's election procedures, the Hearing Officer correctly found that the Employer engaged in widespread and unlawful polling of employees. The unlawful polling affected virtually every eligible voter because it occurred during mandatory captive audience anti-union meetings. It is well settled that when an employer engages in widespread violations of Section 8(a)(1), the Board will order a second election. The only exception is where the employer can show that it is virtually impossible that its unlawful conduct affected the outcome of the election, an exception that the Employer in this case cannot satisfy.

II. COURSE OF PROCEEDINGS

Amazon.com Services LLC (the Employer) is an internet based business that sell books, music, housewares, electronics and other goods. (JEX 1, p. 1) On November 20, 2020, the Retail, Wholesale and Department Store Union (the Petitioner) filed a petition seeking to represent approximately 1,500 employees at the Employer's fulfillment center located in Bessemer, Alabama, known as BHM1. (JEX 1, p. 1) The Employer took the position that the unit should consist of more than 6000 employees. (JEX, 1 p. 1)

A pre-election hearing was conducted via videoconference on December 18, 21 and 22, 2020. JEX p. 2. At the close of the hearing, the only matter remaining in contention was whether the Regional Director should conduct a manual (in person) or mail ballot election. (JEX 1, p. 2) The Petitioner argued that a mail ballot election using the NLRB's standard election procedures was appropriate given the local COVID-19 conditions. (JEX 1, p. 2) The Employer argued that a manual election should be conducted. (JEX 1, p. 2)

Because election arrangements are non-litigable matters, the Regional Director did not permit the Employer to present live testimony in support of its position that a manual election could be safely conducted at BHM1 during the COVID-19 pandemic. (*See*, JEX 1, p. 2). Instead,

the Regional Director gave the Employer until December 28, 2020 to submit an offer of proof in the form of declarations with attached documents in support of its request for a manual election. (*See*, JEX 1, p. 2). The Petitioner was allowed until December 31, 2020 to submit a rebuttal offer of proof. *Id*. Both parties were also allowed to submit post hearing briefs by January 7, 2021. (JEX 1, p. 2)

On January 7th, the Employer filed a post-hearing brief urging the Regional Director to adopt, among other things, a series of measures that the Employer argued would increase security and voter turnout. On page 65 of its post- hearing the Employer proposed that the NLRB install, "with Amazon's support, a mail ballot drop box at BHMl." (JEX 4, p. 65) The proposal included the following elements: (i) The NLRB Regional Office would be the sole holder of the keys to the drop box; (ii) A Board agent from the Birmingham office could visit BHMl on a periodic basis to empty the ballots into a ballot box and seal it with the date collected written on the tape; (iii) in addition to counting the number of ballots deposited, the Board agent would also register the date and all times the box was opened (if the Board has such an ability or technology) and (iv) the drop box would be clearly marked with the Notice of Election on official NLRB paper. *Id*.

On January 15, 2021, the Regional Director issued the Decision and Direction of Election (DDE). (JEX 1) The DDE provided for a mail ballot election in accordance with Section 11336 of the NLRB's case handling manual. *Id*. Significantly, the DDE did not adopt the Employer's request that the Region install a "mail ballot drop box." *Id.*

On January 21, 2021, the Employer filed a request for review of the DDE. (JEX 5) The Employer argued that "the Acting Regional Director erred by declining to accept *any* of Amazon's proposed safeguards to protect voters, reduce disputes and increase voter turnout . . . ." *Id*. at p. 40 (emphasis in original). In footnote 25, the Employer explained that "[t]hat these proposals

included sending out an official NLRB notice via Amazon's electronic communication platform, AtoZ; requesting that all associates update their mailing addresses by a certain date; *having the NLRB place a mail-ballot drop box at BHM1*; and scheduling automatic extensions to the due date for the submission of ballots based on the percentage of votes received." (brackets & italics added) Thus, the Employer understood and interpreted the DDE as not accepting the proposal for a mail-ballot drop box.

The Petitioner filed an opposition to the Employer's request for review on February 1, 2021. The NLRB denied the Employer's request on February 4, 2021.[1] As provided in the DDE, the Region mailed ballots to eligible voters on February 8, 2021 with a receipt date of March 29, 2021. (JEX 1, p. 10) The Region commenced counting ballots on March 30, 2021 and certified the tally of ballots on April 9, 2021, showing 738 votes for and 1,798 votes against the Petitioner with 505 challenged ballots. (BEX 1(a))

On April 16, 2021, the Petitioner filed objections to the conduct of the election. (BEX 1(b)) The Regional Director issued an Order Directing a Hearing and a Notice of Hearing on Objections dated April 26, 2021. (BEX 1 (f)) The Employer then filed a motion for meaningful notice of objections, which resulted in the Regional Director issuing a supplemental report on objections and Order Directing a Hearing on Objections dated April 30, 2021. (BEX 1(h) and 1(j))

A hearing on the Petitioner's Objections was held before Region 10 Hearing Officer Kerstin Meyers on 12 days between May 7 – 26, 2021. The parties filed post-hearing briefs in support of their respective positions on June 11, 2021. On August 2, 2021 Hearing Officers Meyers issued her report and recommendations, recommending the Objections 1, 2, 3, 4, 6, 11 and

[1] The Petitioner requests that the Hearing Officer take administrative notice of the facts that (i) the Petitioner filed an opposition to the request for review and (ii) the NLRB denied the Employer's request for review on February 4, 2021.

17 be sustained and that a second election be ordered.[2] On August 16, 2021, The Employer filed Exceptions to the Hearing Officer's Report and Recommendations and a brief in support of those Exceptions. This is the Petitioner's Answering Brief in Support of the Hearing Officer's Report and Recommendations.

III. SUMMARY OF RELEVANT FACTS

The Employer's peak season ended shortly after December 25, 2020. (Tr. 1299) On December 30, 2020, the Employer sent a text message to all associates with the anti-union message that BHM1 opened during a challenging time and that management and associates have not had enough time to get to know each other. (UEX 1) The text asserted that "if the union wins, we never will" implying that voting for the union means that BHM1 will fail. *Id*. The text then closes with false assertion that the Union will divide BHM1. *Id*.

A few days later on January 4, 2021, the Employer texted all associates with the anti-union campaign theme of "Don't give Up Your Voice." (UEX 2) Contrary to Section 9 (a) of the Act, the text message stated that "if a union represents employees at BHM1 and you have a problem or concern, you cannot go to your manager, you must bring that concern to the union instead. The union will decide whether to bring your issue to us or not." *Id.* This theme that employees should speak for themselves was a prominent anti-union campaign message. (Tr. 74; *see*, UEX 3 "<u>We want to caution you, you will be giving up your right to speak for yourself.</u>*"*(emphasis in original))[3]

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[2] Hearing Officer Meyers also recommended that Objections 5, 7, 10, 13, 14, 15, 19, the interrogation allegation in Objection 20 and Objection 23 be dismissed. The Petitioner did not file exceptions with respect to this recommendation. In addition, The Petitioner withdrew Objections 8, 9, 12, 16, 18 and 22.

[3] Union Exhibit 3 (UEX 3) was identified as an InStallment and an AtoZ message sent to all associates. (Tr. 81) InStallment refers to the posting that BHM1 places inside a bathroom stall. *See*, UEX 16. There was no place in the facility where employees could escape the Employer's anti-union messaging.

A. Phase One of the Employer's Anti-Union Campaign

According to Mr. Todd Logan, starting the week of January 10, 2021 through February 6, 2021, the Employer held mandatory small group meetings (i.e. captive audience meetings). (Tr. 1043) Logan referred to this period as phase one of the Employer's campaign against the Union. (Tr. 1043). The number of employees attending the small group meetings varied from approximately fifteen (15) to twenty-five employees. (Tr. 1154) The meetings ran continuously during the approximate four week period of phase one and there were hundreds of meetings. (Tr. 1154)[4] Logan testified that employee relations managers (referred to a mini-campaign owners (MCO)) made the presentations at the small group meetings. (Tr. 1150) Both Mr. Logan and HR manager Jena Smith testified that an HR representative attended each of the "mandatory" small group meetings. (Tr. 1150, 1600) Smith noted that the HR representative scanned the badges of associates attending the meetings and that they would remain in the meeting to observe. (Tr. 1600) The HR representatives had computers opened during the small group meetings that they were observing. (Tr. 451)

B. Polling and Surveying Employees During the Critical Period

The Employer's agents likewise indirectly polled employees attending captive audience meetings about their support for the union. Mr. Logan testified that during the small group meetings, the Employer put out on a table "Vote No" peccy pins and "Vote No" rearview mirror tags. (Tr. 1151, 1152). According to Mr. Bradley Moss (a labor consultant who attended over 50

[4] Logan testified the meetings "were 30-minute meetings, and there were -- so 24/7 operation, we had multiple shifts, we had back half shifts, we had front half shifts, we had night shifts, both front half and back half, and we would start -- and they were held in two rooms. The max amount allowed in one of the rooms was 15 associates. The max allowed in the second room was 25 associates. And because of that, we had to hold a lot of meetings 16 -- eight hours -- 16 hours each day in each room, and multiply that over four weeks." (Tr. 1154)

meetings (Tr. 1389)), the MCOs would tell employees that they can pick up a "Vote No" peccy pin set out on a table as they walked out. (Tr. 1364; "In -- well, in the meetings that I was a part of prior to the mail ballot period, employ -- associates would come into the meetings**, at some point halfway during the meetings or so, someone from HR would put the Peccy pins on a table near the exit to the conference room. And someone from the emp -- whoever was giving the meeting, via it from employ relations, would mention that if they, associates would like to, on their way out, they could grab a "Vote no" pin that was on the table**."))(emphasis added)[5] The MCOs also displayed the "Vote No" rearview mirror tags during the power-point presentations and reminded employees that the tags where available at a table set up in the room. (Tr. 1152; EEX 69 p. AMZ 00000238)

C. The Employer Pressures the USPS to Install a Cluster Box At the Front Entrance parking lot of BHM1

On January 7, 2021 (the same day the Employer's counsel submitted its post hearing brief), the Employer requested that the United States Postal Service install a collection box at BHM1. (UEX 20) The initial request did not explain the motivation for installation of a collection box but simply noted it was time sensitive. *Id*. On June 8, 2021, USPS employee Linda Mercer informed Amazon employee Brian Palmer that the USPS preliminarily approved a "blue box" for BHM1 (UEX 21 P-0217; Tr. 864) BHM1 employee Miguel Harris emailed Ms. Mercer on January 14 requesting contact information for the local post master because they wanted to get an "eta on delivery and requirements for installation." (UEX 21, P-00270) A day later, Harris emailed Mercer again asking for an update from the post master. (UEX 21, P-00270) Mercer emailed Harris and

[5] With a minimum of 15 employees in each meeting, the number of employees exposed at minimum to this polling and interrogation exceeds 725 employees, a number that when added to the challenged ballots (505) is greater than the vote margin.

Palmer on the same day (January 15) stating that the post master indicated "it would take a little time to locate a collection box and install." (UEX 21, P-00268)

On January 20, 2021, a few days after the January 15 DDE issued with the election dates and the use of the standard mail ballot election procedures (i.e. no NLRB collection box), Palmer reached out to Mercer to inform her that the deadline for installation of the USPS collection box is February 7. (UEX 21, P-00267) Palmer told Mercer that "this is a very high priority item" for Amazon leadership. (UEX 21, P-00266) The same day Mercer agrees to reach back out to local manager of operations and the postmaster for Bessemer. *Id*. Mercer also reminds Palmer that she was never given a specific deadline when the request was initially made. (UEX 21, P-00266) On January 21, 2021, Palmer responds to Mercer's comment about the February 7 deadline that he just got the deadline but "this is a must have" and offers to provide "anything at all" to help get it done. (UEX 21, P-00265)

On January 25, 2021, Mercer received an email from Amazon employee Lorin Moyd requesting an update. (UEX 21, P-00265) Mercer responded that she had escalated the issue to USPS HQ the prior week for follow up on their end. (UEX 21, P-00264) In response to Mercer's email, Brian Palmer emailed Mercer (without other Amazonians copied) to "re-emphasize that this is a priority at the highest levels of the company (David C included) and that it *must* get done." (UEX 21, P-00264)(emphasis added)[6]

On January 26, 2021, Mercer emailed Palmer to inform him that she had emailed USPS HQ and reiterated that the request for the collection box is urgent and that "it must be installed by February 7th." (UEX 21, P-00263) Mercer than asked Palmer to explain the importance of the

[6] "David C" referred to David Clark was the Senior VP for Worldwide Operations and who had been promoted in January 2021 to CEO of Worldwide Consumer Operations. (Tr. 862)

February 7th date because "perhaps that would put some weight to the ask?" *Id*. Palmer responded to Ms. Mercer stating that he appreciated the help and knew that the request to install a collection box by February 7 "is an odd request." (UEX 21, P-00263) Palmer then informed Mercer that the request for installation of the collection box before February 7 was that the facility is "having a mail-in ballot election on February 8" and that the Employer wanted to have a "high a turnout as possible." (UEX 21, P-00263) Though the mail ballot election had been widely reported, Palmer asked her to "please treat this information as sensitive for the time being." *Id*. (emphasis in original)

On January 27, 2021, Ms. Mercer informed Palmer that she figured out the NLRB election was the reason for the request and though a collection box had been located, HQ was questioning the long term use if any. (UEX 21, P-00262) Palmer then adds Becky Moore (another Amazon employee) to the email chain and Ms. Moore writes asking "where we stand on this – this highly visible David Clark initiative – Brian's urgency is valid." (UEX 21, P-00261) The next morning Ms. Mercer writes to Moore and Palmer that she has "sent this up to Jay". (UEX 21, P-00260)

On February 2, 2021, Mr. Jay Smith (USPS Director of enterprise and strategic accounts) emailed David Cardadeiro (Amazon's director of North American supply chain (Tr. 868) with suggestions about how to "help promote employees to feel safe/secure in mailing their ballots via official USPS Blue Collection Boxes." (UEX 24, P-00289-290) Smith was trying to come up with alternatives to "get around the NLRB stating that you just need a 'drop box.'" *Id*. Smith also mentions that the "fact that is [sic] isn't required to be a USPS blue collection box is promising." When asked who told him that the NLRB required just a "drop box", Mr. Smith testified he did not recall exactly but then stated that he believed it came directly from Brian Palmer. (Tr. 870:9-17; 872:3-9)

Mr. Smith recalled recommending to Amazon employees that for "safe secure mail for this" (i.e. the mail ballot election), "there was a variety of options" and he "suggested employees could mail letter from -- safely and securely from their own homes, that they could find any blue – official blue collection box in their neighborhoods, and that they could go to any of their local post offices to safely and securely deposit any mail." (Tr. 869:21-25; 870:1-4) These options, however, were not acceptable to the Employer and Mr. Smith was being told that what was needed was a "drop box." (Tr. 872).

On February 2, 2021, Mr. Adam Baker (Amazon's VP for Transportation) emailed Smith's supervisor Jakki Krage Strako to resolve "an issue with a blue mail collection box at BHM1 for their upcoming vote." (UEX 23, P-00252)[7] Mr. Baker stressed the "criticality of this vote" and the need for the USPS to pick up all the mail for this vote. *Id.* He then proposed that either the Employer would use the non-arrow key box it had purchased or the USPS finds a blue receptacle that is available to be installed by February 8, 2021. *Id.*[8] Ms. Strako responded that the USPS should not have made the commitments to install a collection box and that Smith would work with operational leadership to find a solution within policy. *Id.*

On Wednesday February 3, 2021, Jay Smith notified Becky Moore and Brian Palmer that the USPS had a "secured/approved drop box" that will be installed at the Bessemer facility on Thursday or Friday. (UEX 22, P-00296) Smith further noted that the local operations people had already met with Miguel Harris and that they agreed upon three locations near the entrance, "which

[7] *See*, https://finance.yahoo.com/news/amazon-executive-backed-mailbox-union-180852742.html identifying Mr. Baker as a vice president with Amazon's transportation group and Ms. Strako as USPS's chief commerce and business solutions officer (last visited June 9, 2021).

[8] The fact that Mr. Baker stated that the Employer would use a non-secure box demonstrates the extent it was willing to go to have a drop box at BHM1 to collect mail ballots.

will be easily accessible for the employees that work at the facility." *Id*. Smith also indicated that "with a little work on the CBU [cluster box unit], we are able to increase the capacity potential to approximately 725 letters and 175 flats daily." *Id*.

As indicated in Smith's February 3, 2021 email, the USPS provided and modified the cluster box at its own expense. (Tr. 874) The CBU would be installed instead of a blue box because a blue box could not be put at BHM1 on a temporary basis. (Tr. 907:1-5) Amazon had provided the USPS with a time frame of when the box would be used. (Tr. 907:19-22) Mr. Smith understood that the box would only be needed until the March 29th deadline which was the last day of a vote. (Tr. 865:1-20) The Employer's request for a temporary collection box made it an odd request from the USPS's perspective. (Tr. 933-934)

Another odd feature of this installation was that the cluster box served only one customer. (Tr. 1419) Because the cluster box was only intended for use by the Employer, the modification to the box removed compartment number 12. (Tr. 943-944) However, there was still a key that could open the number 12 slot. *Id*. This meant that if someone had the key to slot 12, they could reach into the outgoing mail compartment. (Tr. 944) The ability to reach into the outgoing mail compartment defeated the purpose for using the arrow key lock for the outgoing mail compartment (i.e. 1P). (Tr. 944-945)

D. The Cluster Box was Placed at the Front Entrance Where All Employees Report to Work and In View of Security Cameras

After the modification to the cluster box was completed, the USPS installed the box in the employee parking lot at the front main entrance to the BHM1 facility. (Tr. 876) The box was placed in the associate pick up area of the parking lot. (Tr. 1290) The front door was approximately 135 feet from the cluster box. (Tr. 1210:9-25) The Employer had also erected tents outside the front entrance near the cluster box where HR personnel would set up tables to hand out materials

during the critical period. (Tr. 437-40; 1289) The front main entrance was the only entrance employees were allowed to use when entering the facility. (Tr. 1282:1-22, Mr. Street testifying that "It's where all employees report. It's the only entrance we have.")

According Rob Street (BHM1's Loss Prevention Manager), there are 30 cameras on the front side of the building facing the employee parking lot. (Tr. 1201) Overall, there are 1,313 cameras at BHM1. (Tr. 1283) Mr. Street testified that four cameras directly captured the cluster box. (Tr. 1212; 1281) These cameras are visible to employees in the parking lot but one cannot tell what the camera is pointing to. (Tr. 1279; 1281-1282) Mr. Street further acknowledged that in addition to cameras on the front of the building, there are cameras in the foyer area of the main entrance. (Tr. 1283) According to Street, the Employer could reconstruct who came from the tent into the building by looking at the different interior and exterior cameras. (Tr. 1283) Street was not aware of any communication with employees about the capabilities of the cameras pointed at the mailbox. (Tr. 1285) Nor was he aware of employees being informed that during the balloting period, the Employer would not review footage from the four cameras pointed at the mail box. (Tr. 1286)

E. The Employer Erected a Tent Around the Mail Box and Placed a Banner with a Campaign Slogan on the Sides of the Tent and Telling Employees to "Mail Your Ballot Here."

During the critical period, the Employer erected a tent around the cluster box and attached a banner to the sides of the tent. (UEX 10) The banner included the Employer's "vote no" campaign theme "Speak for Yourself." *Id*. (Tr. 74, 341, 728; UEX 3) The Employer's witness Ms. Green testified during direct that the Employer "had banners posted throughout the building saying vote no, speak for yourself." (Tr. 1842) The banner also told employees to "Mail Your Ballot Here." (UEX 10) Consistent with the instruction to "Mail Your Ballot Here", Mr. Bibbs testified

he was told by an HR representative standing outside to mail his ballot in the cluster box. (Tr. 425)

The Employer also sent numerous messages informing employees that the USPS had installed the mailbox for them to securely mail their ballots. (UEX 7; EEX 104, AMZ_00000620) MCOs and consultants repeatedly told employees that they should use the USPS cluster box in the employee parking lot to mail their ballot. (Tr. 63-64, 90, 455, 503, 543, 807) The promotion of the cluster box as a safe and secure government controlled site to mail a ballot was not approved by the USPS. (Tr. 899) Mr. Smith testified that he had told Brian Palmer that the Employer was not allowed to place a "vote here" sticker on the cluster box. (Tr. 896:16-25; 897:1-5) However, when he saw pictures of the tent around the cluster box with the "Mail Your Ballot Here" banner, Mr. Smith testified that he "was surprised because we had said, can anything be put on the physical box and I had said no. And I did not want to see anything else put around that box indicating that it was vote [location]." (Tr. 899:5-13)(Brackets added)

F. The Installation of the Cluster Box for the Purpose of Collecting Ballots Caused Confusion and Distrust and Undermined the Union

Though the Employer erected a tent around the mail box, the USPS was delivering the Employer's mail in the compartment assigned to the Employer, a compartment that the Employer had keys to. (Tr. 880) Some employees did not trust the Employer's assurances that only the USPS had access to outgoing mail. Mr. Jackson testified that he witnessed Allied security personnel enter the tent with a key and open a compartment of the mailbox. (Tr. 811-817, 825-826) Even USPS representatives understood that there would be concerns about collection of mail at the BHM1 cluster box. (UEX 25, P-00224)(Ms. Lawson noted in a February 4 email to Mr. Smith that "the local contact indicated that we should expect concerns to be raised over what we collect.") Mr.

Smith was unaware of the USPS ever installing a collection box for the purposes of the collecting ballots that are mailed in an NLRB election. (Tr. 885)

The unprecedented nature of an USPS installed cluster box for purposes of mailing and delivering ballots in an NLRB election could only cause mistrust in the process. Union organizer Joshua Brewer testified that Amazon employees began calling the Union telling organizers that Amazon was saying that is was going to erect a polling place in the Amazon parking lot right near the front door under the cameras. (Tr. 667) The Union advised employees who called or who they interacted with that would not happen because Amazon had requested that a drop box for ballots be installed but that request was not approved. (Tr. 667-668) The Union had received information that Amazon employees were not very comfortable with the box after Amazon had it installed. (Tr. 670) The Union, when asked, told employees to put their ballots back in the employee's mailbox. (Tr. 669, 671-672)

IV. ARGUMENT

A. The Evidence Supports The Hearing Officer's Recommendation That A Second Election Be Directed Because Of The Employer's Objectionable Conduct Related To Installation Of A CBU On Its Premises

The Hearing Officer had no choice but to recommend a second election given the undisputed evidence of the Employer's conduct. The Employer's pressure on the USPS to install a "collection box" in the employee parking lot at the front entrance to the facility (an area heavily monitored by the Employer) in an effort to "get around the NLRB", its sustained campaign to pressure employees to use the collection box and its unlawful polling of unit employees necessarily destroyed the "laboratory conditions" Board procedures seek to create so that employees can freely participate or not in a Board conducted election.

1. The Hearing Officer correctly rejected the Employer's "legitimate purpose" defense because the Employer's intent is not a relevant consideration but also because the facts show that the mailbox did not serve a legitimate purpose but instead created confusion and the impression that the Employer was able to have its own collection box installed for purposes of handling mail ballots.

The Employer leans heavily on the argument that the mailbox served the legitimate purpose of increasing voter turnout. The Hearing Officer correctly observed that the Employer's intent is not a relevant consideration. Moreover, the goal of increasing turnout does not override more important objectives such as ensuring that voters trust the integrity of the process and the Board's role in overseeing the election. As the Board recently observed in *Professional Transportation Inc.*, 370 NLRB No. 132 (June 9, 2021), the "Board must first and foremost protect its election procedures from actual interference. But this is not enough. Even **the appearance of irregularity** in election procedures may cast doubt on the validity of an election and its results." *Id.* (emphasis added). Based on this principle, the Board has set aside elections "where actions in the course of the election conveyed the impression to voters that the Board was not in complete control of the election process." *Id*. Safeguarding the Board's exclusive control of the election process helps foster the important belief that the election "was conducted under conditions that were fair to all." *2 Sisters Food Company*, 357 NLRB 1816, 1820 (2011).

Increasing voter turnout at all cost has never been the Board's policy. Though increasing turnout is a desirable goal, the Board has long noted that this goal does not override the importance of protecting employee's right to vote free from molestation and that the corollary to the right to vote free from molestation is the freedom to refrain from voting and that it is not the employer's rightful role to exert pressure on the employee to exercise the privilege of the ballot. See, *R.H. Osbrink Manufacturing*, 104 NLRB 42, 51 (1953).

As the hearing officer noted, the Employer's conduct more likely than not depressed turnout because of the confusion and distrust it generated over the conduct of the election. (Report, p. 24) Testimony from employee witnesses supports the conclusion that the mysterious installation of the "collection box" on the eve of the election and the campaign to pressure employees into using what was widely viewed as the Employer's collection box created distrust and confusion over the election process and who was in control. The Employer further sowed confusion and insecurity by messaging all employees with the uncorroborated accusation that Union agents were "harvesting ballots" and that their "home mailboxes were not secure." (Report p. 27) In footnote 4 of the Employer's brief, the Employer tries to justify the uncorroborated accusation that Union agents were compromising the security home mailboxes by insinuating that the Union was "mysteriously" able to satisfy the showing of interest in November 2020.

Finally, the Employer's claim that employee's perceived the "mailbox as just a mailbox" (Employer's Brief p. 20) is flat wrong. The overwhelming evidence in the record established that the collection box was viewed correctly as the Employer's mailbox installed for the purpose of collecting mail ballots. Common sense also undercuts the Employer's claim that the mailbox was "just a mailbox." The collection box was installed on the Employer's property at the front entrance to the facility (something that would have never occurred without the Employer's permission) and the Employer retained access to its mailbox to retrieve mail (again something that cannot occur with a USPS owned blue box). The most convincing fact that the collection box belonged to the Employer was the erection of the tent with "mail you ballot here" signage around the box. The USPS did not authorize such an arrangement and would not have tolerated such a set up around a mailbox it owned, especially since the USPS did not want the Employer to install signage informing employees to use the collection box as a mail ballot receptacle. Had this truly been a

collection box owned and exclusively controlled by the USPS, such undisputed conduct would not have occurred.[9]

The Employer's argument implicitly recognizes that if the mailbox was perceived as the Employer's collection box (as the Hearing Officer found), then installation of such a box on the eve of ballots being mailed taints the election and brings into to question the integrity of the process and the Board's control over the conduct of the election. Needless to say, parties to an election should not be allowed to install their own drop boxes for the purpose of collecting mail ballots or otherwise pressure the USPS into installing a CBU on its private property for such purpose. Such conduct only undermines the NLRB's exclusive role as the neutral conducting the election.

2. The Hearing Officer correctly determined that the installation of the cluster box on the Employer's property contravened the D & DE.

The Hearing Officer found the D & DE did not authorize the installation of a drop box on the Employer's premises for purposes of collecting mail ballots. The Employer does not dispute the Hearing Officer's reading of the D & DE. (Employer's Brief p. 21) Instead, the Employer makes the argument that because the Hearing Officer noted that the Regional Director did not have the foresight to rule out all the ways the Employer could try to avoid the denial of its request for a drop box on its premises, the Hearing Officer conceded that the D & DE did not prohibit the mailbox. (Employer's Brief p. 21) The Employer's argument, however, reverses the order of things: the issue is not whether the D & DE prohibited the installation of a mail ballot collection

[9] The Employer's contention that the cluster box belonged to the USPS is also disingenuous. The record evidence established that the USPS provided the CBU (cluster box unit) because the Employer complained that it did not have enough time to order and install its own CBU with an arrow key and meet the February 7, 2021 deadline. (Report p. 25) The USPS's guidelines regarding the installation of a cluster box unit make clear that these are private mail receptacles and that the customer is responsible for providing secure keys and also maintaining the unit. *See*, UEX 31, p. 7 (P-00184).

box on the Employer's premises (whether privately owned or not) but whether it authorized such departure from the Board's mail ballot election procedures.

Presumably, the D & DE rejected the installation of drop box on the employer's premises because doing so would invite employees to bring their ballots to work and be subjected to the type of "molestation" and interference that the Board seeks to prevent. Moreover, the Board's well established rules for conducting a mail ballot election do not provide for collection of ballots on the employer's premises. Because the Board must retain exclusive control over the conduct of the election and determined the particular mechanics for conducting an election, the fact the D & DE did not provide for a mail ballot collection box on the Employer's premises after the Employer had requested one is (to use the Employer's phrase) dispositive. The Employer arranging for the installation of a mail box on its premises for the purpose of collecting mail ballots was not authorized by the D & DE and thus such conduct contravened the D & DE.

Finally, there should be no doubt that the Employer understood that it was engaged in an effort to "get around" the D & DE and made the USPS a reluctant accomplice to such effort. Mr. Jay Smith's email to David Cardadeiro (Amazon's director of North American supply chain) (Tr. 868) clearly showed that the Employer and the USPS were discussing ways to "get around" the Regional Director's decision regarding the drop box. The Employer was clearly the source of information about the RD's position regarding installation of a "drop box" on the Employer's premises for purposes of collecting mail ballots. Indeed, the USPS representatives did not want the Employer to advertise the cluster box unit as a mail ballot collection point because this would clearly signal that the purpose for installing the CBU was to circumvent the D & DE.

Because the Employer arranged for the installation of a mail box for the purpose of collecting mail ballots in a NLRB supervised election without prior authorization and did so

knowing that it was "getting around" the D &DE, the Hearing Officer correctly concluded that a second election is required. All parties to a NLRB supervised election must be required to follow the D &DE and when seeking to depart from standard methods for conducting an election, they must have prior authorization to do so; otherwise, it will invite the type of "free for all" that threatens to undermine the integrity and perceived fairness of the election and the Board's exclusive role in determining how an election will be conducted.

3. The Hearing Officer correctly concluded that given the totality of the circumstances, the installation of a cluster box unit on the Employer's premises for the purpose of collecting mail ballots in a NLRB supervised election was objectionable conduct under Board precedent.

The Employer advances several arguments as to why the mail box installed on its premises for purposes of collecting mail ballots in a NLRB supervised election is not objectionable conduct under Board precedent. These arguments, however, lack merit. They are largely based on overly narrow readings of the Hearing Officer's findings and recommendations or simply unsupported by the record evidence or Board precedent.

The Employer first argues that the mail box it installed was like "any other mail box" and not a drop box designed to simulate a polling place. (Employer's Brief, pp. 24-25) The Employer seemingly concedes that it is objectionable for a party to set up a private polling location. Undertaking such conduct clearly usurps the Board's exclusive role for determining and supervising how an election is to be conducted.

The argument that the cluster box installed in the employee parking lot at the front entrance to the warehouse was an "everyday" mail box ignores the undisputed evidence. First, the cluster box was installed for the purposes of collecting mail ballots during a NLRB supervised election. Employees were told that this was the purpose of the cluster box even though the USPS did not want the Employer to make such representations.

Second, unlike the normal use of cluster box, this cluster box was for the exclusive use of the Employer. There were no other businesses authorized to have mail delivered to this cluster box. Why then would the Employer need a cluster box with twelve (12) individual compartments? The obvious answer is that it doesn't need a cluster box and that absent the rush to have a box installed to collect mail ballots, this mailbox would never have been installed. It simply defies logic to describe a naked cluster box installed in an employee parking lot as an "everyday" mailbox.

Third, if the mailbox was like any other mailbox, then why instruct managers, supervisors and other non-unit employees to not use or even go near the cluster box? The only purpose for giving such instruction is if the Employer is attempting to simulate a polling place. The Employer knew employees would bring mail ballots to work to deposit them in the cluster box, and, in fact repeatedly told employees to do so. Because Board would never permit a party's agents to station themselves near a ballot box and observe employees drop ballots in a ballot box, the Employer sought to replicate that condition.

Fourth, the Employer put the "everyday" cluster box under a tent that had a "mail your ballot here" message on the side. Clearly, this was intended to communicate to employees that they can bring their ballots to work, fill them out and cast them in the cluster box under the cover of a tent. If there is any doubt the Employer sought to simulate a polling location, it had sought to place a "vote here" sticker on the cluster box. (Tr. 896:16-25) Indeed, Mr. Street (the Employer's head of loss prevention at BHM1) agreed that the Employer's set up simulated a polling location.

No Employer who simply intends to install a mailbox for everyday use would undertake these measures. The sole purpose for installing a cluster box in the employee parking and then undertaking measures to pressure employees to bring their ballots to work and cast their mail

ballots using the cluster box was to establish a private polling place; a polling place that was not supervised or established by the NLRB.

The Employer's argument that no employee was duped into thinking the cluster box was a NLRB official polling place is a strawman argument. (Employer's Brief, p. 25) There is no requirement that the Union prove that the Employer misrepresented that its private polling place was an official NLRB polling location. The Hearing Officer correctly noted that the objectionable conduct was causing the USPS to install an unmarked CBU to collect ballots and then then undertaking extensive measures to get employees "to cast their ballots" using the CBU. (Report p. 31) It is precisely because this conduct occurred on the Employer's premises without the Regional Director's authorization or the Region's supervision that the Employer showed it could "unilaterally establish procedures for the election and cast doubt on the Board's authority and control over election procedures." (Report, p. 31)

Moreover, the record evidence established that the Employer's installation of the cluster box in the employee parking lot immediately became a flash point during the election. Union organizer Joshua Brewer testified that employees began telling organizers that the Employer was saying that is was going to erect a polling place in the employee parking lot right near the front door under the cameras. (Tr. 667) Because it was clear that the Employer wanted employees to use the cluster box and repeatedly pressured them into casting their ballots using the cluster box, the use of the box became an indicator of whether an employee supported the Employer or the Union. The cluster box in the employee parking lot thus gave the Employer an unfair advantage

over the Union. It is this type of unfairness that the Board's precedent and procedures seek to prevent.[10]

The Employer also takes issue with the Hearing Officer's findings regarding the location of the cluster box in plain view of security cameras. (Employer's Brief, p. 30) Though the security cameras were installed prior to the Union organizing drive, the Hearing Officer correctly noted that the installation of a cluster box for the purposes of having employees cast their mail ballots in plain view of the security cameras created the impression of surveillance and thus the situs of the cluster box was objectionable. (Report p. 31)

Under well-settled Board law, it is unlawful for an Employer to create the impression that it is recording employees who are engaged in voting. *See*, *Day Inn Management*, 299 NLRB 735, 737 (finding that the creation of the impression of surveillance of voting activity had a reasonable tendency to interfere with, restrain, and coerce individuals affected in the exercise of their Section 7 rights and thus violated Section 8(a)(1) of the Act.); *see generally*, *ITT Automotive*, 324 NLRB 609, 623 (1997)(the continued presence of management near the voting area interfered with employee's freedom of choice in the election and thus warranted a second election).

The evidence clearly established that employees had a well-founded impression that the Employer was <u>continuously</u> recording employees as they entered or exited from the tent surrounding the mail box. Mr. Street testified that the mail box area was in the view of four

[10] The Employer's argument that the implications of the Hearing Officer's approach are startling completely miss the mark. (Employer's Brief p. 29) Hearing Officer's "approach" only recognizes that there are limits to what an Employer can do to increase voter turnout. The Hearing Officer's recommendations would not support conducting a second election because an employee happens to use an Employer or Union's pre-existing mail room. But this is not that case. Here you have an Employer unilaterally installing a cluster box in an employee parking <u>after</u> the D &DE issued denying a request for drop box, simulating a polling place by erecting a tent around the cluster box and then repeatedly reminding employees to use the cluster box to cast their mail ballot.

security cameras mounted on the front side of the building near the front entrance. (Tr. 1212; 1281) Mr. Street further confirmed that the Employer could determine the identity of employees entering and/or exiting the cluster box tent by reconstructing a path from images recorded by different cameras. (Tr. 1283) Thus, there is no question that the four cameras could record the identity of employees entering and/or exiting the cluster box tent.

Second, employees testified that they were aware of the cameras and that they believed the cameras could record everything that happened in the parking lot, including who entered and exited the cluster box tent. Because the Employer's unauthorized polling location was at the front entrance to the building and all employees were required to use this entrance, the impression of surveillance affected almost all eligible voters. (Tr. 1282:1-22) Moreover, the surveillance was not limited to employees who actually casted their ballots at the Employer's CBU, but also encompassed employees who refrained from doing so. The Employer created the impression that it knew who was and wasn't using its makeshift polling place. The Employer's acknowledged ability to record activity near or around the mail box tent and the objective impression of employees that all activity in the parking lot was recorded by the Employer supports the Hearing Officer's finding that there was ample evidence that employees reasonably believed that the Employer was able to surveil employee's ingress and egress into the tent and could discern which employees cast their ballots using the CBU. (Report p. 28)

The Employer's only argument supporting an exception to this finding (i.e. that there was a reasonable basis for believing that the Employer was able to surveil the voting activity at the CBU) is that "there is no evidence that employees held that belief, much less that the belief was reasonable." (Employer's Brief, p. 32-33) As to whether employee's held this belief, the record

is replete with testimony that employees believed all activity in the parking lot was under surveillance.[11]

The Employer also argues that the impression of surveillance in this case is far less than the impression that could exist in a typical manual election because there were other options available to cast a ballot. (Employer's Brief p. 33) This argument ignores the ample evidence that the Employer's pervasive and extensive security camera network creates the impression that employees are constantly under surveillance and not just for a brief moment. It is also overlooks that employees who refrained from using the cluster box to cast their mail ballot had the reasonable impression that the Employer was aware of this decision also. Given the polarizing effect of the Employer's unilateral decision to install a CBU in the employee parking for the purpose of collecting mail ballots, employees reasonably believed that not using the CBU would signal to the employer their position regarding the Union. Thus, the fact that employees had other options for mailing in their ballots does not lessen the effect of the perceived surveillance on their Section 7 activities.

The Employer contends that the Hearing Officer's view of the 'Speak for Yourself" message on the tent as improper electioneering is unfounded because the message was not

[11] Mr. Woods testified about at a conversation with security guard: "We was talking about -- we was talking about all the cameras inside the building, and that's how it came up with the cameras outside the building. He said -- he said there was also cameras outside the building." (Tr. 736) Ms. Bell testified that "[t]hey have cameras everywhere in that building and outside. So they know exactly what is going on around their building, as I recall." (Tr. 459 and Tr. 482-83). Ms. Bates noted that "[b]ecause the thing is the -- the mailbox is pushed in the back of the tent. So the cameras can see people going in. They can see who's walking in the -- in the job." (Tr. 239) She further stated at tr. 216 that "Yes, I knew that they [security] had eyes on the mailbox for -- it's able to see the employees who is coming to drop their ballots off. And I felt like they were identifying the people who dropped their ballots off." Finally, Mr. Richardson testified that "we talk all the time that if you do something outside, security camera watching you. Everywhere you move, security camera watching you." (Tr. 75)

electioneering but a neutral statement and, in any event, the electioneering could not have influenced any voter because they had already completed their ballots before casting them using the CBU. (Employer's Brief, pp.34-35)

The claim that the "Speak for Yourself" message was not electioneering ignores the mountain of evidence establishing this slogan as the Employer's central "vote no" campaign theme. (Tr. 74; *see*, UEX 3 "We want to caution you, you will be giving up your right to speak for yourself." (emphasis in original)) The Employer's own witness Ms. Green testified during direct that the Employer "had banners posted throughout the building saying vote no, speak for yourself." (Tr. 1842) Thus, employees clearly understood that the "Speak for Yourself" slogan was anything but a neutral statement; it urged employees to vote no, the very definition of electioneering.

The Hearing Officer properly rejected the Employer's argument that the electioneering (occurring at the very site where employees were repeatedly asked to cast their ballot) had no influence on voters because they had already filled in their mail ballot before bringing it to work. (Report p. 30) As the Hearing Officer observed, the distinction the Employer draws between a mail ballot and a manual election is not one articulated by the Board. *Id*. The Employer cites no authority for the proposition that in a mail ballot election, the Board's rules prohibiting electioneering don't apply.[12]

[12] There is no reason to believe that the Board would not extend the rules prohibiting electioneering to the mail ballot context. The Board has extend rules develop in the context of a manual election to mail ballot elections. For example, in *Guardsmark LLC*, 363 NLRB No. 103 (2016) the Board revised *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959)'s extension of *Peerless Plywood Co.* 107 NLRB 427, 429 (1953) (i.e. no captive audience meetings allowed within 24 hours to opening of the polls in a manual election) to the mail ballot context.

The Employer speculates that the employees who used the CBU to cast their mail ballot had already completed the ballot at home. The only evidence in the record is that several employees brought mail ballots to their work area and completed the ballot while at work with the help of an MCO or consultant. (Tr. 64, 128, 131-132 "You know you got employees who were bringing up that they [management] were showing them how to fill it out."; "She was showing her how to fill it out, helping her fill it out."; "the one who helped fill out the ballots, left with the ballots.") Moreover, employees certainly could have completed their mail ballot while in the employee parking and in plain sight of the Employer's slogan.

The Hearing Officer correctly noted that the installation of the CBU in the employee parking was a benefit conferred during the campaign and that it directly impacted voting. (Report p. 29) The Employer argues that the installation of the CBU which made voting easier was not a benefit meant to curry favor and thus not objectionable. (Employer's Brief, p. 36)

As the Hearing Officer noted, the Employer's actions demonstrated to employees that it could ignore the NLRB's control of the election process and confer the benefit of a "convenient" option for casting a mail ballot regardless of whether it had permission to do so. *See generally*, *B & D Plastics Inc.*, 302 NLRB 245 (1991)(noting conferring a substantial benefit tied to an election is grounds for setting aside the results of an election).[13] In this case, the Employer's witness, J.T.

[13] In *B & D Plastics Inc.*, the Board applied a multi factor test to determine if a pre-election benefit would tend to unlawfully influence the outcome of an election. The Board examines (i) the size of the benefit in relation to its stated purpose, (ii) the number of employees receiving it, (iii) how employees would reasonably view the purpose of the benefit and (iv) the timing of the benefit. 302 NLRB 245. As the Employer indicated in its messages to employees, the stated purpose for installing the mail box related directly to the election process. (UEX 7, EEX 104, AMZ_00000620) Every eligible voter received this benefit and it was clearly viewed as the Employer's efforts to pressure employees into voting whether they desired to do so or not. Finally, the timing coincided with the date the Region had indicated it would mail out ballots to eligible voters.

Thompson, testified that the installation of the cluster box was a meaningful benefit and convenience. (Tr. 1815)

Finally, though the Employer claims that installation of the cluster box is not an improper benefit because it would not induce votes in support for its "vote no" position, the evidence belies this assertion. (Employer's Brief, p. 37) The Employer undertook extraordinary measures to have the cluster box installed prior to the Region mailing out ballots to eligible voters. The "hair on fire" email messages the Employer's agents sent to USPS representatives proves the point that installation of the CBU was viewed as critical to the Employer's "vote no" campaign. No rational employer actively campaigning against a Union in a mail ballot election would have pressured the USPS to install a CBU in its employee parking lot, if it didn't believe that the CBU would induce more employees to vote no than yes. The installation of the CBU, coupled with the Employer's extensive pressure campaign to cast a ballot using the CBU, was clearly designed to induce employees on the fence to vote no.

4. The Regional Director should adopt the Hearing Officer's recommendation that a second election be directed because the Employer's conduct with respect to the CBU requires such result.

The Employer's final argument is that even if its conduct with respect to the cluster box is found objectionable (which it is), such conduct could not have affected the election results.[14] First and foremost, in a case where a party flagrantly disregards the Board's established procedures, circumvents the Board's authority to exclusively control the conduct of an election, pressures another government agency to acquiesce in a scheme to circumvent the Board's exclusive authority

[14] The Employer points to a 1063 vote margin to justify its claim that the margin is too great to have been affected by its misconduct. However, this margin fails to consider the approximate 400 ballots the Employer challenged and the overall 505 challenges. Had this ballots been counted (many of Employer's challenges were based on signature issues), the margin is substantially closer than the tallied number.

to oversee the conduct of NLRB elections and establishes a private polling place on its premises without Board supervision and/or authorization in clear contravention to the D &DE, the Board would adopt the standard used in cases involving Board agent misconduct. This standard does not require proof that the objectionable conduct could have reasonably affected the outcome of the election. Instead, the Board focuses on whether the objectionable conduct interfered with the integrity of the Board's election procedures or created the appearance of irregularity. *See*, *Goffstown Truck Center*, 356 NLRB 157 (2010)(setting aside an election because the employer had misrepresented Board procedures and acted as though they had the imprimatur of the Board).[15]

There should be little doubt that the Employer's conduct in this case undermined the Board's exclusive control over election procedures and that the Employer, through its words and deeds, communicated the message to employees that it had the power to set up its own private polling place with the assistance of the USPS. The Board should not and must not tolerate this behavior. The Board must send a clear message to employers that circumventing the Board's procedures for conducting mail ballot elections, establishing a private polling place at the work site and disregarding a D & DE that did not authorize such action will result in a second election if requested by the Union.

Second, the Hearing Officer correctly noted that over 2,000 voters did not participate in the election. The Employer's conduct in sowing confusion and distrust over the integrity of the balloting process could have affected the outcome by discouraging these voters from participating. The Employer's argument that the Hearing Officer's theory lacks a ring of plausibility assumes

[15] The requirement that the objectionable conduct could have reasonably affected the outcome of the election stems from the principle that the Board will not lightly overturn the results of an election. However, this principle assumes that the election was conducted consistent with the Board's election procedures, it is the following of procedures that impart confidence in the result. Where a party has disregarded the Board's procedures, this principle should have less force.

that the unprecedented installation of the CBU in the employee parking lot did not cause a sufficient number of employees to distrust the entire voting process.

Finally, the Employer's "iron fist in velvet glove" approach regarding the use of the CBU to cast a mail ballot was directed towards all eligible voters. (Report p. 29) The Employer's campaign to pressure employees into voting, coupled with the impression of surveillance (i.e. the impression that the Employer knew whether or not an employee had cast a balloting using the CBU) could have reasonably affected the results of the election.

B. The Hearing Officer Correctly Found that the Employer Engaged in Objectionable Conduct when it Distributed "Vote No" Paraphernalia at its Hundreds of Captive Audience Meetings

The Employer's exceptions to the Hearing Officer's Report finding merit in the Union's Objection 11 regarding the Employer's polling of employees is based on a mischaracterization of the facts and a fundamental misapplication of the relevant case law. The Employer contends that its distribution of "vote no" paraphernalia was not "coercive" and thus could not sustain an objection, likening its efforts to simply leaving the materials on a break room table. This is so far from the actual facts as to strain the bounds of credulity past its breaking point. The Employer distributed these materials at ***captive audience meetings*** that employees were required to attend where the Employer stated its fervent opposition to the Union. (Emphasis supplied).

According to Todd Logan, who was in charge of running the Petitioner's anti-union campaign, starting the week of January 10, 2021 through February 6, 2021, the Employer held mandatory small group meetings (i.e. captive audience meetings). (Tr. 1043) The number of employees attending the small group meetings varied from approximately fifteen (15) to twenty-five employees. (Tr. 1154) The meetings ran continuously during the approximate four week

period of phase one and there were hundreds of meetings. (Tr. 1154)[16] Logan testified that employee relations managers (referred to a mini-campaign owners (MCO)) made the presentations at the small group meetings. (Tr. 1150) Logan and HR manager Jena Smith testified that an HR representative attended each of the "mandatory" small group meetings. (Tr. 1150, 1600) Smith noted that the HR representative scanned the badges of associates attending the meetings and that they would remain in the meeting to observe. (Tr. 1600) The HR representatives had computers opened during the small group meetings that they were observing. (Tr. 451) Logan also testified that during the small group meetings, the Employer put out on a table "Vote No" peccy pins and "Vote No" rearview mirror tags. (Tr. 1151, 1152). According to Mr. Bradley Moss (a labor consultant who attended over 50 meetings (Tr. 1389)), the MCOs would tell employees that they can pick up a "Vote No" peccy pin set out on a table as they walked out. (Tr. 1364; "In -- well, in the meetings that I was a part of prior to the mail ballot period, employ -- associates would come into the meetings**, at some point halfway during the meetings or so, someone from HR would put the Peccy pins on a table near the exit to the conference room. And someone from the emp -- whoever was giving the meeting, via it from employ relations, would mention that if they, associates would like to, on their way out, they could grab a "Vote no" pin that was on the table**.")(Emphasis added)[17] The MCOs also displayed the "Vote No" rearview mirror tags

[16] Logan testified the meetings "were 30-minute meetings, and there were -- so 24/7 operation, we had multiple shifts, we had back half shifts, we had front half shifts, we had night shifts, both front half and back half, and we would start -- and they were held in two rooms. The max amount allowed in one of the rooms was 15 associates. The max allowed in the second room was 25 associates. And because of that, we had to hold a lot of meetings 16 -- eight hours -- 16 hours each day in each room, and multiply that over four weeks." (Tr. 1154)

[17] With a minimum of 15 employees in each meeting, the number of employees exposed at minimum to this polling and interrogation exceeds 725 employees, a number that when added to the challenged ballots (505) is greater than the vote margin.

during the power-point presentations and reminded employees that the tags where available at a table set up in the room. (Tr. 1152; EEX 69 p. AMZ 00000238)

Objection 11 claims that the Employer engaged in extensive and unlawful polling and/or interrogation of employees during the campaign. The Employer admitted that it placed on a table in its captive audience meetings (of which there were likely hundreds conducted attended by thousands of employees) "vote no" peccy pins and "vote no" rearview mirror tags. MCOs would tell employees during these meetings to pick up a "vote no" peccy pin or rearview mirror tag while leaving the meeting. Of course, employees were forced to either pick up the anti-union paraphernalia or not as they left the meetings, in plain view of the MCOs, consultants and HR representatives, effectively having to declare whether they were for or against the Union.

The undisputed evidence shows that employees were required to attend multiple meetings over several weeks leading up to the mailing of the ballots on February 8, 2021. By its own admission there were hundreds of meetings held over the course of four weeks leading up to the mailing of the ballots on February 8, 2021. Thousands of employees attended these captive audience meetings multiple times over the course of the four weeks leading up to the mailing of the ballots where these vote no materials were laid out for employees to take in plain view of supervisors and other managers. Employees, who were required to attend these meetings, had their badges scanned as they entered the room where the captive audience meetings were held. Thus, the Employer knew exactly who was in attendance because it kept track of employees being time off task. The Employer conveniently ignores the Hearing Officer's undisputed finding that employees were required to attend these meetings where the vote no materials were being offered, making this unlike a situation where the materials were simply laid out in a break room. These materials were made available at meetings where the Employer's anti-union message was being

hammered home on a repeated basis. The Employer would also have the Regional Director ignore the undisputed evidence that the Employer's HR representatives were present in the meetings, some of them with open lap tops. It is simply not credible for the Employer to contend that it did not know who attended these meetings because only "consultants" or MCOs not normally assigned to BHM1 were in the room.

The Employer also argues that these hundreds of meetings where it engaged in coercive conduct were not a big deal because the unlawful polling took place weeks before the election. That simply isn't true. The unlawful conduct took place right up to the point where captive audience meetings were no longer allowed and the ballots were mailed. In *Guardsmark LLC*, 363 NLRB No. 103 (2016) the Board revised *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959) extension of the *Peerless Plywood Co.* 107 NLRB 427, 429 (1953) (i.e. no captive audience meetings allowed within 24 hours to opening of the polls in a manual election) to apply to the mail ballot context. The Board recognized that allowing Employers to hold captive audience meetings when employees are set to receive their ballots had the same coercive effect as allowing such meetings right before employees are set to vote in a manual election. Thus, there is no difference that the objectionable conduct occurred in a mail ballot context several weeks before the ballots were opened. The fact is the hundreds (if not thousands) of acts of objectionable conduct occurred right up to the time that employees received their mail ballots. Accordingly, this is a distinction without a difference.

By placing the "vote no" materials on a table in a captive audience meeting and then telling employees to take one if they wanted to as they exited, all under the watchful eye of the MCOs and other HR representatives, the Employer invited or required employees to make an observable choice that would disclose their union sentiments. *See, 2 Sisters Food Group, Inc.*, 357 NLRB

1816, 1818 (2011) (finding that "employers may not distribute campaign paraphernalia in a manner pressuring employees to make an observable choice that demonstrates their support or rejection of the union." (citing *Circuit City Store*, 324 NLRB 147 (1997)). That is exactly what the Employer did in this case. In advising employees to pick up antiunion paraphernalia on their way out the door as all eyes watched them make an observable choice of whether they supported the Union or the Employer. This was not simply making anti-union paraphernalia available at a central location where "supervisors are absent from the distribution process and there is no other coercive conduct in connection with the distribution." *Id.*; *see also, Black Dot, Inc.*, 239 NLRB 929 (1978) (Mere availability of anti-union buttons in flower pot hung on a wall did not reasonably interfere with employees' free choice). Rather, the Employer's conduct in this case was more akin to making the antiunion paraphernalia available in the plant manager's office, thereby "pressuring employees openly to declare themselves against the union by presenting themselves at the office for a vote no button." *Valmet, Inc.*, 367 NLRB No. 84, Sl. Op. 3 (2019) (citing *Kurz-Kasch, Inc.*, 239 NLRB 1044 (1978); see also *Great Western Coca Cola Bottling Company*, 256 NLRB 520, 520 (1981) (By repeatedly offering "vote no" buttons and observing who accepted or rejected them, employer effectively polled employees regarding their sentiments towards the union in violation of the Act.). This conduct clearly violates section 8(a) (1) of the Act and requires a rerun of the election. As the Board has consistently held that it is its "normal policy to direct a new election when an unfair labor practice is committed during the critical period because 'conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of free and

untrammeled choice in an election.'" *Wayne County Neighborhood Legal Services, Inc.*, 333 NLRB 146, 148 (2001).[18]

Despite the Employer's contention, its HR managers, MCOs, consultants and employee relations managers attending these meetings were able to see who picked up the antiunion paraphernalia thereby disclosing whether employees favored or opposed the Union. This was not a central location where the paraphernalia was made available to employees where supervisors were absent. These materials were distributed in captive audience meetings, that employees were required to attend, in which the Employer's anti-union message was all that was discussed. These materials were not left in an area where managers were not normally present. They were made available in meetings controlled by and supervised by managers and HR representatives. The manner in which the employer made these materials available, in a captive audience meeting under the watchful eye of managers and supervisors, clearly pressured employees to make an observable choice or "open acknowledgement of their union sentiments." *A.O. Smith Automotive Products Company*, 315 NLRB 994, 994 (1994). Thus, the Employer engaged in coercive, objectionable conduct in the distribution of antiunion paraphernalia.

As the Hearing Officer correctly noted, the Employer created a situation where the employees were forced to make a choice whether to accept the materials and thus make a declaration of their support or non-support for the Union. This was not a break room or an area that was not generally frequented by supervisors or managers. This was a meeting in a room that

[18] "The only exception to this policy is for violations as to which it is virtually impossible to conclude that they could have affected the election results." *Wayne County*, 333 NLRB at 148, n. 13 (citing *Establishment Industries*, 284 NLRB 121, 130 n. 17 (1987), enfd. mem. 838 F.2d 1217 (9th Cir. 1988). That is not the case here where the Employer committed multiple violations of the Act over the course of hundreds of meetings attended by thousands of employees in which it disseminated its vote no paraphernalia.

was controlled by the Employer where its anti-union message was disseminated and employees were required to attend. This is more akin to the situation where the employer violated section 8(a) (1) by making vote no buttons available during an anti-union captive audience meeting. *Niblock Excavating, Inc.*, 337 NLRB 53 (2001). In *Niblock*, the employer conducted a captive audience meeting in which an anti-union video was shown. After the video was shown, the employer made a bag of "union no" buttons available while supervisors remained in the room. Three employees did not take buttons. The conduct by the employer was found to violate section 8(a)(1) because it distributed "union no" buttons "in a manner in which an employee would effectively reveal his support for the Union to the [supervisors] if the employee refused to take one. *Id*. at 65. Likewise, the conduct of the Employer in this case is similar to that of the employer in *Lott's Electric Co.*, 293 NLRB 297 (1989), enfd.mem. 891 F.2d 281 (3rd Cir. 1989), where the employer distributed vote no buttons just as employees were reporting to a meeting to watch an anti-union campaign movie.

The Employer's reliance on *San Gabriel Transit, Inc.*, Case 21-CA-39559, 2011 NLRB Lexis 391 (Div. of Judges, August 1, 2011), does not save their objectionable conduct. In that case the ALJ ignored the central holdings of Board decisions in *A.O. Smith*, *Circuit City*, and *Barton Nelson, Inc.*, 318 NLRB 712 (1195) to find that because the meeting was attended only by the employer's anti-union consultants, their actions in distributing vote no paraphernalia did not violate the Act. The ALJ then surmised without factual support, that it was "unlikely employees would view the consultants as having the direct employment impact that supervisors have." *Id*. at 23. In the instant case, HR representatives of the Employer and other supervisors attended the multiple meetings that employees were forced to attend. The conduct occurred not just one meeting, but at hundreds of meetings over the course of at least 4 weeks leading up to the mailing

of the ballots. Clearly, these facts are distinguishable from the facts found in *San Gabriel*.[19] At bottom, the Employer's conduct in distributing vote no paraphernalia at hundreds of captive audience meetings attended by thousands of employees just before the ballots were mailed falls well within the scope of the Board's holdings in *Kurz-Kasch* and *A.O Smith* that finds that such conduct is violative of the Act. Accordingly, the Hearing Officer's recommendation sustaining Objection 11 should be affirmed.

C. The Method of the Rerun Election Should Not Reward the Employer for its Objectionable Conduct

The Petitioner would not object to a manual rerun election so long as it does not reward the Employer for the overwhelming misconduct it has committed in this case. In setting forth its position, however, the Petitioner wishes to stress two main points. First, the Petitioner does not object to a manual election assuming that COVID-19 transmission has receded to safe levels and that an in-person election can be safely held consistent with public health recommendations. Currently, hospitals in Alabama, including Jefferson County, are being overwhelmed with COVID-19 patients and there is a shortage of ICU beds because of the influx of COVID-19 patients.[20] The positivity rate in Jefferson County, Alabama is still high at 17%.[21] The Petitioner respectfully submits that the Regional Director should exercise her discretion in accordance with the Board's direction in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020) in determining whether a

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[19] *San Gabriel Transit* is of questionable value as precedent. It is an ALJ decision that is contrary to established Board precedent. No exceptions were taken to the decision and no other ALJ or the Board has cited it for any reason. Thus, it should not be relied on to form a basis to excuse the Employer's objectionable conduct in this instance.

[20] See https://www.al.com/news/2021/08/55-of-alabamas-icu-patients-have-covid-as-bed-shortage-grows.html (last visited August 30, 2021)

[21] The current moving 7-day percentage of positive tests is 17.2% and the overall level of community transmission is considered high. See, https://alpublichealth.maps.arcgis.com/apps/MapSeries/index.html?appid=d84846411471404c83313bfe7ab2a367 (last visited August 30, 2021)

manual or mail ballot rerun election should be ordered. Second, the Employer, who has shown a willingness to go to great lengths to interfere with employee free choice in this election, including bending a purported independent federal agency to its will, should not be permitted to be rewarded for its objectionable conduct. If a manual rerun election is ordered, it should be directed to held at an off-site neutral location.

In *Austal USA, LLC*, 357 NLRB 329 (2011), the Board reiterated that "[t]he Act is silent on the locations of elections. The choice of sites is therefore committed to the discretion of the Board." *Id*. at 330. The Board in *Austal* further noted that "'it clear under the broad remedial powers contained in section 10(c) of the Act and our administrative powers to conduct elections under Section 9(c)(1)(A) of the Act, that the Board may designate the site of an election." *Id*. (citing *Halliburton Services*, 265 NLRB 1154, 1154 (1982)).

In *Austal*, the Board granted the Union's special permission to appeal and reversed and remanded to the Regional Director her decision to direct a third rerun election at the employer's premises. In that case, the Union had requested that the third rerun election be held at a neutral location or by mail ballot because of the employer's egregious unfair labor practices and objectionable conduct committed in the two previous elections. 357 NLRB at 330. The request by the Union was made orally and opposed by the employer. The Regional Director orally denied the request and directed that the third election be held at the employer's premises. *Id*. The Union requested and was granted special permission to appeal from this determination.

"The Board has stated that the choice of the election site should ordinarily be left to the sound discretion of the Regional Director, because the Regional Director, through his agents, can investigate potential sites and evaluate their suitability." *Id*. at 331. In *Austal* the Board held that because it was unable to determine whether the Regional Director had abused her discretion (or

exercised it all), a remand was necessary. In remanding the direction of election the Board held that the Regional Director should consider the following factors:

> First, the Petitioner's objection to holding the third election on the Employer's premises, the Employer's request that it be held there, and the grounds therefor.
>
> Second, the extent and nature of the Employer's prior unlawful and objectionable conduct and the fact that the Petitioner has made a request to proceed despite the fact that the compliance period relating to the prior unlawful conduct has not yet closed. See Casehandling Manual Section 11302.2.
>
> Third, the advantages available to the Employer over other parties to this proceeding if the election is conducted on premises it owns or otherwise controls.
>
> Finally, the Regional Director must evaluate the alternative site proposed by the Petitioner, as well as other readily available sites. In evaluating these sites, the Regional Director shall consider their accessibility to employee-voters, the ability of the Board to conduct and properly supervise the election on the site, whether the parties to this proceeding have equal access to and control over the site, and the cost of conducting the election on the site.

Id. at 331.

The Employer's objectionable conduct in this case is extensive. The record evidence reveals that it went to extraordinary lengths to coerce the USPS into installing a CBU at BHM1 in order to establish its own polling location not under the control of the NLRB. These efforts reached the highest levels of the company. (See UEX 21, P-00264 "this is a priority at the highest levels of the company (David C included) and it must get done.").[22] Thus, the objectionable conduct was not limited to some low level manager or highly paid anti-union consultant but was initiated and prioritized in the C-Suite of the Employer. (See UEX 21, P-00261 Becky Moore email to Brian Palmer and Linda Mercer (USPS executive), "Please let me know where we stand on this – *this is a highly visible Dave Clark initiative*- Brian's urgency is valid.")(emphasis supplied). The

[22] "David C" referred to David Clark was the Senior VP for Worldwide Operations and who had been promoted in January 2021 to CEO of Worldwide Consumer Operations. (Tr. 862)

Employer also committed massive violations of section 8(a)(1) by its polling of employees of their sentiments towards the Union. To permit the Employer to obtain what it sought through its objectionable conduct, a manual election on its property, should not be permitted. Rather, the Regional Director should, if she decides to direct a manual rerun election, order that the election be held at a neutral location. As the Employer has shown, it will spend enormous sums and will take whatever actions are necessary to obtain its way, to attempt to control the election processes. The Employer should not be permitted to use its vast economic power to engage in objectionable conduct and then benefit from it.

The Petitioner would urge that the Regional Director explore the possibility of holding the rerun election at the Bessemer Civic Center ("BCC"), located 1130 9th Avenue, SW, Bessemer, Alabama. The BCC is very close to and only approximately 2.6 miles from the BHM1 facility. It is basically on the other side of Interstate 20/59 from BHM1 and an approximate 5 minute drive from the facility. It is a well-known and centrally located venue. It has a main hall and four large meeting rooms. The main hall seats up to 1200 for entertainment events and it has parking for up to 500 vehicles. https://www.bessemeral.org/civic-center/. The BCC's main hall has 13,000 square feet of space and the meeting rooms have a total of 5,850 square feet of meeting space. https://en.wikipedia.org/wiki/Bessemer_Civic_Center. The BCC is very accessible to the employee voters and large enough for the Board to conduct and supervise a manual election of the size of the one that would take place in this case. In addition, because of its large size, the BCC would allow for social distancing and other COVID-19 protocols to be put in place for the safety of all participants. In addition, as the Board noted in *Austal*, Section 11302.2 the Board's Casehandling Manual, Part Two provides that "[a] place normally used as a municipal voting place is particularly desirable" when considering places other than the employer's premises to conduct

and election. 357 at 330. The BCC fits this bill since it is used as a polling location in municipal elections.https://www.jccal.org/Sites/Jefferson_County/Documents/Board%20of%20Registrars/Bessemer%20Division%20polls%20066282021.pdf.

Accordingly, the Union respectfully requests that if the Regional Director orders that a manual rerun election in this case take place, that she direct that it take place at a neutral off-site location and consider the BCC as a convenient, safe and easily accessible voting location.

V. CONCLUSION

For the reasons stated above the Union respectfully requests that the Regional Director affirm the Hearing Officer's Findings and Recommendations sustaining Objections 1, 2, 3, 4, 6, 11 and 17 and recommending that a second election be ordered.

Date: August 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petitioner's Answering Brief in Opposition to the Employer's Exceptions was filed today, August 30, 2021, using the NLRB's e-filing system and was served by email upon the following:

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